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**IN THE
COURT OF APPEALS OF INDIANA**

ANDREW W. STACY,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 45A03-0701-CR-19

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0404-FB-27

June 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Andrew W. Stacy appeals his conviction and sentence for neglect¹ as a Class D felony. He raises two issues on appeal:

- I. Whether Stacy's conviction for neglect constituted double jeopardy.
- II. Whether the trial court properly sentenced Stacy.

We affirm.

FACTS AND PRCEDURAL HISTORY

This is Stacy's second appeal. In his first appeal,² we stated the facts as follows:

Stacy and his wife Kelly were the parents of four children K.S., A.S., H.S., and T.S. On December 15, 2003, Stacy and Kelly took four-month-old K.S. to the emergency room, where she was pronounced dead on arrival. Stacy told the police he had given K.S. a bottle and put her down to sleep. When Kelly arrived home from work several hours later, she found K.S. dead.

When the police arrived at the Stacys' house to investigate K.S.'s death, "[t]he house was in a complete state of disarray. There was [sic] clothes and dirty clothes, garbage, rotting food everywhere in the living room and also there was a smell stench [sic] of garbage and rotting food throughout the house." (Tr. at 60.) "The kitchen from the living room area, looking into the kitchen, you could see the rotting food on the stove, countertops, everywhere. Garbage was literally piled from the countertop to the cabinets, on the floors, everywhere within the place." (*Id.* at 61.) The officers noted the smell of sewage in the residence. When they arrived, Kelly's father was using a snow shovel to move trash from the floor into a garbage can. He told the police "he had shoveled a path for us." (*Id.* at 122.) Officers found a blood spot on the bed where K.S. had been sleeping. The Stacys' three other children, A.S., H.S., and T.S., were at a neighbor's house. The children had lice, were dirty and unkempt, and were not wearing shoes or socks. A.S., H.S., and T.S. were taken into the custody of Child Protective Services.

(Footnotes omitted).

¹ See IC 35-46-1-4.

² *Stacy v. State*, No. 45A03-0510-CR-499 (Ind. Ct. App. Aug. 26, 2006)

Stacy was charged and convicted of six counts of neglect. Four of the counts (Count III- VI) were for Class D felony neglect of each of his four children. Counts I and II were charges of neglect as a Class B and Class C felony respectively for the death of his child, K.S. The trial court, in its abstract of judgment, listed that Stacy was found guilty of all six neglect convictions: Count I as a Class B felony; Count II as a Class C felony; and Counts III, IV, V, and VI each as a Class D felony. *Appellant's App.* at 21-22. The trial court merged the Class C and Class D felony convictions related to K.S. into the Class B felony conviction. The trial court sentenced Stacy to eight years for the Class B felony neglect of K.S. and one year each for the Class D felony neglect charges related to Stacy's other three children, all running consecutively. In total, Stacy received ten years executed and one year suspended to probation.

On appeal, we reversed Stacy's convictions for neglect as a Class B and Class C felonies in Counts I and II. We remanded the case to the trial court for the limited purpose of sentencing him on his conviction for neglect of K.S as a Class D felony. Also, this court held that the trial court did not abuse its discretion in imposing consecutive sentences. On remand, the trial court imposed two years for the Class D felony to run consecutive to his three other Class D felony convictions, for a total of five years. Stacy now appeals.

DISCUSSION AND DECISION

I. Double Jeopardy

Stacy first contends that he cannot be put in jeopardy twice for the same neglect, and that by originally entering a neglect conviction as a Class B felony, the trial court

was required to vacate his lesser-included Class D felony conviction. Stacy claims that vacation left the trial court without a Class D felony neglect conviction to sentence him on remand, and, thus his new sentence subjected Stacy to double jeopardy in violation of the constitution.

Article I, Section 14 of the Indiana Constitution provides, “No person shall be put in jeopardy twice for the same offense.” In *Green v. State*, 856 N.E.2d 703 (Ind. 2006), our Supreme Court addressed whether an appellate court’s vacation of a greater offense may permit a trial court to enter a conviction and sentence on a lesser-included offense. For double jeopardy purposes, the Court found there is no reason to vacate a jury’s conviction on the lesser-included offense when the trial court only entered judgment and sentence on the greater offense. *Id.* at 704 (citing *Carter v. State*, 750 N.E.2d 778, 780 (Ind. 2001)). The Court stated that merging the lesser-included offense into the greater offense is the appropriate remedy and that the trial court is not required to vacate the jury’s conviction.

Here, the State charged Stacy with six counts of neglect: three counts (Class B, C, and D neglect) were related to the neglect of K.S.; and the remaining three Class D felony counts were related to the neglect of Stacy’s three other children respectively. Stacy appealed, and we reversed his two convictions for neglect as a Class B felony and as a Class C felony, but held there was sufficient evidence to support his neglect conviction as a Class D felony. On remand, the trial court entered a sentence of two years on the previously merged D felony. Because the trial court was not required to vacate the Class D felony neglect charge in its original sentencing abstract, but only merge it into the

greater-offense, and because, on remand, the trial court only convicted and sentenced Stacy on the Class D felonies related to each of his four children, Stacy does not present a double jeopardy violation.

II. Sentence

Stacy further challenges the enhanced nature of his sentence. Sentencing determinations are within the discretion of the trial court, and a trial court may only be reversed for an abuse of that discretion. *Fuller v. State*, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), *trans. denied*.

Here, the trial court on remand sentenced Stacy on the Class D felony conviction for the neglect of K.S. During re-sentencing, the trial court noted that the death was a result of Stacy's neglect. The trial court imposed two years, one half year greater than the presumptive sentence for a Class D felony, but a year less than the maximum available for the crime. *See* IC 35-50-2-7. The trial court also ran the sentence consecutive to the existing three other Class D felony sentences, each equal to one year respectively.

Death may be a proper aggravator when it is not an element of a crime. *See* IC 35-38-1-7.1(a)(1). And, a single aggravator may be used to enhance a sentence and run a sentence consecutive. *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied*. Here, K.S. died as a result of Stacy's neglect, and neglect as a criminal offense does not require a showing of death. The trial court used this fact to enhance Stacy's sentence and run it consecutive to the other convictions. The trial court did not abuse its discretion by enhancing and ordering it to be served consecutive to the other terms.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.